Supreme Court of the United States

OCTOBER TERM, 1951

Nos. 186 and 187

SAM K. CARSON, COMMISSIONER OF FINANCE AND TAXATION FOR THE STATE OF TENNESSEE, PETITIONER,

versus

ROANE-ANDERSON COMPANY ET AL. RESPONDENTS,

AND

SAM K. CARSON, COMMISSIONER OF FINANCE AND TAXATION FOR THE STATE OF TENNESSEE, PETITIONER,

versus

CARBIDE AND CARBON CHEMICAL CORPORATION ET AL., RESPONDENTS

BRIEF OF THE STATE OF SOUTH CAROLINA AMICUS CURIAE

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

The State of South Carolina by its Attorney General and pursuant to Rule 27-9 (d) of this Court, files this brief in support of a petition for the writ of certiorari to the Supreme Court of the State of Tennessee, filed in this Court

by Sam K. Carson, Commissioner of Finance and Taxation for the State of Tennessee.

REFERENCE TO REPORTS OF OPINIONS IN COURTS BELOW

These cases were consolidated for trial in the Chancery Court for Davidson County, Nashville, Tennessee, and but one opinion was rendered disposing of the consolidated cases (No. 186R.50, No. 187R.47). This opinion is not reported. Three opinions were filed by the Supreme Court of Tennessee: a majority opinion (No. 186R.7; No. 187R.5) a concurring opinion (No. 186R.24; No. 187R.23) and a dissenting opinion (No. 186R.26; No. 187R.25), the latter being filed by t vo of the five Justices who comprise that court. These opinions are reported in 239 S. W. (2d) 27.

STATEMENT OF JURISDICTION

The State of South Carolina adopts the statement of jurisdiction as made in the brief for petitioner.

In addition, the Supreme Court of Tennessee has construed a Federal Statute, to wit: Section 9 (b) of the Atomic Energy Act of 1946, that an independent contractor is not liable for the taxes imposed by the Tennessee Sales and Use Tax Act. The Supreme Court of Tennessee having rested its decision upon an improper interpretation of Section 9 (b) of the Atomic Energy Act of 1946, a Federal question of grave importance has been raised not heretofore decided by this Court. The question presented is of much importance to a number of states and should be decided by this Honorable Court. Unless a determination of this question is made by this Court there will be much confusion and much litigation in several states, which litiga-

tion may be the reverse of the Tennessee decision of which the State of South Carolina here complains.

INTEREST OF THE AMICUS CURIAE

1. The General Assembly of the State of South Carolina enacted a sales and use tax on the retail sale of tangible personal property. This act became applicable on July 1, 1951, and has not yet been printed in the Acts. This Act is substantially the same as the Tennessee Act except that the South Carolina Act levies the tax on the purchaser or consumer and not upon the vendor. This difference would not affect the issues here as to the respondents in this case.

2. The Atomic Energy Commission is now having constructed by contract a huge plant within South Carolina, which plant is known as the Savannah River Project.

3. The Atomic Energy Commission has entered into a cost-plus-fixed fee contract with E. I. duPont deNemours and Company, which contract calls for the expenditure of many hundreds of millions of dollars—we are informed nearly the billion dollar mark. This independent contractor will spend great sums in the State of South Carolina for the purchase of materials and supplies with which to construct this project. A proper construction of Section 9 (b) of the Atomic Energy Act of 1946 will determine to a great extent whether or not purchases of tangible personal property by the duPont Company will be subject to the South Carolina Sales or Use Tax.

STATEMENT OF THE CASE

The State of South Carolina adopts the statement of the case as made in the brief for petitioner.

ISSUES INVOLVED

The questions presented by the petitioner and reasons for granting the writ of certiorari are briefly as follows:

1. Does Section 9 (b) of the Atomic Energy Act of 1946, 42 U. S. C. A., 1951 Supplement, Section 1809 (b), exempt from State sales or use tax the purchase and use of tangible personal property by cost-plus-fixed fee contractors of the Atomic Energy Commission as being "activities" of the Commission itself?

ARGUMENT AND CITATION OF AUTHORITY

The doctrine of implied constitutional immunity is not applicable to respondents since they are independent contractors making their own purchases of material and supplies.

The Supreme Court of Tennessee determined that respondents were independent contractors and not agents of the Atomic Energy Commission.

This Court has held on a number of occasions that the doctrine of implied constitutional immunity from taxation is not applicable to independent contractors even though they are performing a contract for the United States.

James v. Dravo Contracting Company, 302 U. S. 134,

State of Alabama v. King and Boozer, 314 U. S. 1,

Curry v. United States, 314 U. S. 14

In the case of *Alabama v. King and Boozer*, which we think is applicable here, this Court said:

> "They were not relieved of the liability to pay the tax either because the contractors in a loose and general sense were acting for the Government in purchasing the lumber or, as the Alabama Supreme Court seems to have thought, because the economic burden

of the tax imposed upon the purchaser would be shifted to the Government by reason of its contract to reimburse the contractors."

Certainly the great trend of the present and late decisions of this Court is not to extend governmental immunity from state taxation, that is, beyond the national government itself and functions performed by its officers and agents. The constitution under its present interpretation by this Court presupposes the continued existence of the states functioning in co-ordination with the national government. Under such interpretation the states have authority to lay taxes and to regulate their internal affairs and policy. State taxation necessarily imposes some burdens upon the national government, but, so long as such burden is not direct it does not come within the constitutional limitation.

> *Penn Dairies v. Milk Control Commission of the Commonwealth of Pennsylvania*, 318 U. S. 261, 270, 271.

Any tax exemption claimed by respondents must come from express Congressional grant.

The Supreme Court of Tennessee said:

> "Did the Congress of the United States enact appropriate legislation to immunize the independent contractors involved in the case?" (No. 186R.18, 19; 187R.17).

It is not questioned that Congress possibly could have enacted such legislation, but, as was said in *State of Alabama v. King and Boozer*:

> "Congress has declined to pass legislation immunizing from State taxation, contractors under 'cost-plus' contracts for the construction of governmental projects."

The fact that Congress failed to expressly prohibit the states from taxing independent contractors when contracting for the United States leads to but one conclusion and that is, such was not intended by the Congress. If the Congress had so intended it would have expressly stated such exemption and such could not be read into the statute.

It is earnestly contended that if the Congress had power to immunize these independent contractors from state taxation it would have done so by clear and precise language so that there would be no question thereabouts.

We know of no legal definition of the word "activities" which would give it the meaning given it by the Supreme Court of Tennessee, that is, that such "activities" would extend to and include cost-plus-fixed fee contractors.

The Atomic Energy Act of 1946 does not in any of its terms exempt from state sales and use taxation the purchase and use of tangible personal property by independent cost-plus-fixed fee contractors, even though such contracts are with the Commission.

It is a sound rule of construction that when the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to statutory interpretation. It is only when the words of the statute need interpretation that the Courts are called upon to pass thereon. In this statute there are no words exempting respondents from the tax.

The Congress exempted by plain language the income of the Atomic Energy Commission, its property and its activities. We submit that such would have been exempt under the doctrine of constitutional immunity and it is strange that having put words in the statute which were not necessary, Congress would have left out those now contended for by respondents.

The State of South Carolina respectfully submits that the Supreme Court of Tennessee has incorrectly and loosely interpreted Section 9 (b) of the Atomic Energy Act of 1946, thereby raising a serious Federal question and request that the writ of *certiorari* be granted.

Respectfully submitted,

T. C. CALLISON,
Attorney General of South Carolina.

CLAUDE K. WINGATE,
Assistant Attorney General of South Carolina.